TENGKU AZMI TENGKU YUSOFF & ANOR.

v.

TENGKU AHMAD TENGKU ABDUL GHAFFAR & ORS.

FEDERAL COURT, KOTA BHARU
WAN SULEIMAN ACTING CJ (MALAYA)
SALLEH ABAS FJ
HASHIM YEOP SANI J
[FC CIVIL APPEAL NO. 89 OF 1980]
6 JUNE & 17 SEPTEMBER 1981

CIVIL PROCEDURE: *Res judicata - Whether objections raised in present case similar to objections raised in appellant's summons-in-chambers - Whether decision of Judge in summons-in-chambers final.*

LAND LAW: *Estate - Distribution of immovable property - Sale by private treaty ordered - Sale conducted by private tender - Whether sale bad in law.*

By consent order dated 4 December 1978, the learned Judge ordered that all immovable properties from the estate of the deceased, Tengku Meriam bt. Tengku Ahmad, as contained in the said order be sold by private treaty among the beneficiaries of her estate and also among the beneficiaries of the estates of two other deceased, at prices not less than the valuation to be given by either the Director of Valuation, Kelantan or the Asian Appraisal (Malaysia) Sdn. Bhd. in 1977 whichever was greater, failing which: (i) by public tender at the prices not less than the prices abovementioned and if not successful; (ii) then by public auction at prices not less than the reserve prices to be fixed by the Court.

A notice tawaran (private tender) was issued by the Senior Assistant Registrar (SAR) with a list of the properties and the reserve prices. A copy of the said notice was sent to each of the beneficiaries inviting them to tender for the properties. Out of the four beneficiaries who bid, excluding the appellants herein, Tengku Ahmad and Tengku Juhan proved successful.

The appellants filed a summons-in-chambers on 27 September 1979 to have the order set aside on the grounds that: (1) No attempt was made to call the beneficiaries for any meeting and/ or negotiations for a private treaty; and (2) there was no public tender for the sale of the properties. This application was dismissed by the learned Judge on the grounds that since there was no set procedure as to how a sale by private treaty was to be conducted, it was not incumbent on the SAR to call for a meeting of the beneficiaries to negotiate the sale. The learned Judge considered that the manner in which the present sale by private tender had been conducted amounted, in effect, to a sale by private treaty. The appellants appealed against this dismissal but the notice of appeal was subsequently withdrawn.

On 5 October 1979, Tengku Ahmad, as administrator, agreed to sign an agreement with himself in his personal capacity agreeing to convey and transfer the properties he sucessfully tendered for to himself in that latter capacity. A similar agreement was entered into between Tengku Ahmad and Tengku Juhan. An application by the appellants for stay was dismissed on 20 January 1980.

On 7 February 1980, Tengku Ahmad applied for the sale of the properties which he and Tengku Juhan had successfully tendered for to be confirmed by the Court. The appellants objected to this application on similar grounds as stated in their summons-in-chambers dated 27 September 1979, but the learned Judge allowed the application. The learned Judge held that

the procedure followed was equivalent to a private treaty and that the appellants had not been prejudiced in any way. He further held that the present grounds relied on by the appellants in their objection were the very grounds advanced in their summons-in-chambers to set aside the sale by private tender. The appellants appealed against the learned Judge's decision.

Learned Counsel for the appellants submitted that private treaty required consensus reached through negotiations by the parties with each person being aware of what the others are prepared to pay. On the other hand, he argued that private tender was done in secrecy without any consensus leading to an agreement. He also argued that the prices prevailing in January 1977 were substantially different from those prevailing in December 1979, the date the sale was confirmed.

The issues were whether the sale by private treaty was bad in law; and whether the Judge erred in holding that the matter was *res judicata*.

Held:

[1] Even if the procedure adopted in effecting the sale was erroneous, the result was correct, just and expeditous. After all, the identity of the other potential bidders are known, and there was nothing to prevent the appellants from approaching the others, who are by no means numerous to find out what each was bidding. Even if each maintained strict secrecy, the net result will be advantageous to all as the total sum available for distribution would be maximised. Futhermore, real property in Kelantan is not subject to rapid increase in value because they must be sold in a restricted market. Therefore, it is a reasonable way of conducting a sale by private treaty, and the appellants cannot claim that their interests have been prejudiced.

[2] The decision of the learned Judge in dismissing the appellant's application to set aside the sale by private tender by way of summons-in-chambers satisfies the requirements of finality in that it is not liable to be rescinded, varied or re-opened by the tribunal which pronounced it. Therefore the plea of *res judicata* raised by the respondents should succeed.

[Appeal dismissed with costs.]

Case referred to:
Cundy v. Lindsay [1878] 3 App Cas 459

Other sources referred to:
Res Judicata by Spencer-Bower & Turner, 2nd Edn., p. 371

For the appellants - A. Gomez; M/s A. Gomez & Co.
For the 1st respondent in personal capacity - Foo Say Ghee; M/s Foo Say Ghee & Co.
For the 1st respondent as administrator - Ang Kiang Leng; M/s Dzaiddin & Co.
For the Official Administrator - Aria Ratnam

JUDGMENT

Wan Suleiman Acting CJ (Malaya):

By a consent order made on 4 December 1978 the learned Judge ordered that all immovable properties to Tengku Meriam bt. Tengku Ahmad, deceased as set out in the order be sold by private treaty among the beneficiaries of her estate and also among the beneficiaries of the estate of Tengku Som bt. Sultan Ahmad, deceased including the beneficiaries of the estate of Che Bidah bt. Abdul Rahman, deceased, at prices not less than "the present valuation to be given by the Director of Valuation, Kelantan or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. in 1977 whichever are greater", and if this is not successful:

(ii) by public tender at the prices not less than the prices abovementioned and if this is not successful;

(iii) then by public auction at prices not less than the reserve prices to be fixed by the Court.

A notice Tawaran (private tender) dated 28 July 1979 was then issued by the SAR closing originally on 29 August 1979 and later altered to 2 September 1979, the conditions of tender being set out in the Surat Tawaran (at pp. 65 and 66 of the appeal record). It gave a list of the properties and the reserve prices determined in the manner set out in the consent order, and was sent under sealed cover to each of the beneficiaries, inviting any beneficiary who wished to tender to do so at a price not less than the reserved price stated in the notice tawaran, and to accompany each tender with a cheque to the amount of 10% of the sum tendered.

Tengku Ahmad bin Tengku Abdul Ghaffar, Tengku Amri bin Tengku Yusoff, Tengku Mohamed bin Tengku Yusoff and Tengku Juhan Ariffin bin Tengku Yusoff tendered. Tengku Ahmad bin Tengku Abdul Ghaffar was successful in the bid for all the properties except for 2 pieces of land. The latter went to Tengku Juhan Ariffin. The present appellants failed to tender. The Assistant Official Administrator, Kelantan as representative of the estate of Tengku Som bte. Sultan Ahmad did not tender but agreed to the procedure adopted.

The appellant filed a summons-in-chambers on 27 September 1979 to have the order set aside on the grounds that:

(1) No attempt was made to call the beneficiaries for any meeting and/or negotiations for a private treaty.

(2) There was no public tender for the sale of the said properties.

This application to set aside was dismissed by the learned Judge for the reasons set out in his grounds, the substance of which is that since there is no set procedure as to how sale by private treaty is to be conducted, it is not incumbent on the SAR to call for a meeting of the beneficiaries for the purpose of negotiating the sale of the various items of property. The learned Judge considered that the manner in which the present sale by private tender had been conducted amounts, in effect, to a sale by private treaty.

Against this dismissal the appellants appealed.

Before us and the Court below Mr. Gomez for the appellants said that this notice of appeal was subsequently withdrawn because he had failed to serve it in time and secondly he thought that the objection then was premature as the parties did not come to a private treaty.

On 5 October 1979 Tengku Ahmad as administrator agreed to sign an agreement with himself in his personal capacity agreeing to convey and transfer the properties he successfully tendered for to himself in that latter capacity. A similar agreement was entered into between Tengku Ahmad and Tengku Juhan Ariffin in respect of the two pieces of land the latter and successfully tendered for.

An application by way of summons-in-chambers by the appellants for stay was dismissed on 20 January 1980.

On 7 February 1980 Tengku Ahmad applied for the sale of the properties which he and Tengku Juhan Ariffin had successfully tendered for to be confirmed by the Court. The appellants filed an affidavit objecting, the grounds being:

(i) No attempt was made to call us and/or the other beneficiaries for any meeting or negotiation for a private treaty.

(ii) No valuation report given by the Director of Valuation, Kelantan or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. are enclosed in the same affidavit of Tengku Ahmad.

The learned Judge allowed the application of Tengku Ahmad made in his summons-in-chambers dated 7 February 1980 and the appellants now appeal to us.

The grounds of appeal may be summarised thus:

(1) The sale by private treaty was bad in law.

(2) The Judge erred in holding that the matter was *res judicata*.

Learned Counsel for the appellants when dealing with ground one submitted that "private treaty" which it will appear has never been legally defined should be given the common dictionary meaning. Before us as he had done before the learned Judge, he argues that private treaty requires consensus, that there should be negotiations by parties who should come together and bargain and only thereafter come to an agreement. In bargaining he says, each person would know what the others are prepared to pay. Private tender, he asserts, is not the same thing and is done in secrecy. He cited the case of *Cundy v. Lindsay* [1878] 3 App Cas 459 for the proposition that there was no censensus of mind which could lead to any agreement.

Referring to the valuation report the other complaint is that prices prevailing in January 1977 would be substantially different from those prevailing in December 1979, the date of confirmation of the sale.

As no evidence was advanced to support this contention, and also because we should perhaps take judicial notice of the fact that real property in Kelantan is not subject to rapid increases in value because they must be sold within a restricted market, we can safely disregard this argument.

In his reasons for dismissing appellants' application to set aside the sale, the learned Judge dealt at some length on the reason why he regarded the procedure followed as being equivalent to a private treaty, and that neither appellant had been prejudiced in any way. He also remarked that no bid higher than those offered by the successful tenderers has ever been made by any of the other beneficiaries since the closing of the tender.

As his Lordship said in another part of his judgment, he had considered the following facts:

(a) that the sale prices were not less than the valuation made by the Director of Valuation, Kelantan;

(b) that the appellants had themselves failed to tender;

(c) it was no secret in the sense that the beneficiaries are prohibited from discussing among themselves as to the values;

(d) the appellants did not file objection before the closing of the date of tender i.e. 2 September but did so well after;

(e) no higher bid was ever made.

We are inclined to agree with the learned Judge that even if the procedure adopted in effecting the sale was erroneous, the result was correct, just and expeditious. After all, the identity of the other potential bidders are known, and there was nothing to prevent the appellants from approaching the others, who are by no means numerous to find out what each was bidding. Even if each maintained strict secrecy, the net result will be to the advantage of all, because to succeed each would have to outbid the others, and the eventual total sum available for distribution would thus be maximised. It appears to us to be a reasonable way of conducting a sale by private treaty, and we fail to see how the appellants can claim that their interests have been prejudiced.

The other ground on which the learned Judge based his decision to allow respondents' application for confirmation of the sale of the properties and of the estate is that the present grounds of objection to the application were the very grounds advanced in their summons-in-chambers of 1 January 1980 to set aside the sale by private tender. The dismissal of that summons-in-chambers having been withdrawn, the matter, he held, is *res judicata.*

In summons-in-chambers of 1 January 1980, the grounds advanced by appellants to set aside the sale were:

(i) No attempt had been made to call appellants and/or the other beneficiaries for any meeting and/or negotiations for a private treaty.

(ii) There was no public tender for the sale of the said properties.

In objecting to respondents' application in statement of claim dated 20 February 1980 for confirmation of the sale etc. the grounds were that:

(a) No attempt had been made to call appellants and/or the other beneficiaries for any meeting and/or negotiations for a private treaty; and

(b) No valuation report was given by the Director of Valuation, Kelantan, or the valuation given by Asian Appraisal (Malaysia) Sdn. Bhd. were enclosed in the affidavit of the respondents supporting the application in the statement of claim latter mentioned.

We agree with the learned Judge that the substance of the objection is the ground first mentioned in both instances i.e. the sale by private tender as conducted by the SAR was not in accordance with the consent order which called for sale by private treaty as the first choice.

At p. 371 of the 2nd Edn., of that admirable treatise on *Res Judicata* by Spencer-Bower & Turner appears the following passage:

> For the purpose of estoppel *per rem judicatam,* ..., the judicial decision relied upon as creating the estoppel must be shown to have been final in both the senses there indicated: that is to say, there is no estoppel if the judicial decision, as recorded, is imperfect, provisional, indefinite, or ambiguous, or if though *ex facie* appearing to be final, it is liable, whether at common law, or by statute, to be rescinded, varied, or re-opened by the tribunal which pronounced it.

We are of the view that the decision of the learned Judge in dismissing appellants' application to set aside the sale by private tender made by way of summons-in-chambers dated 1 January 1980 satisfies both these requirements of finality and would therefore with respect agree with the learned trial Judge that the plea of *res judicata* raised by respondents should succeed.

We would therefore dismiss the appeal with costs.

Also found at [1982] CLJ 22